Supreme Court of the United States.

OCTOBER TERM, 1889.

MOFFETT, HODGKINS & CLARKE COMPANY,
Petitioner.
against
THE CITY OF ROCHESTER, GEORGE W. ALDRIDGE, WILLIAM W. BARNARD AND JOHN U. SCHROTH, COMPOSING THE EXECUTIVE BOARD OF THE CITY OF ROCHESTER.
Respondents.
No. 217.

RESPONDENTS' POINTS.

On writ of certiorari to the United States Circuit Court of Appeals for the second circuit, granted by this court on March 6, 1899. (173 *U. S.*, 704.)

This suit was brought by the petitioner in the United States Circuit Court for the Northern District of New York, against the respondents, the City of Rochester and the several members constituting its executive board, for the purpose of procuring the rescision and reformation of a bid made by the petitioner, for constructing a

steel pipe conduit and appurtenances for the City of Rochester, and to enjoin the respondents from declaring the petitioner in default with respect to such proposal, and from declaring the bond executed in its behalf forfeited, and from in any manner suing upon, or attempting to enforce or collect such bond

Record, pp. 1-9.

In its bill of complaint the petitioner alleges that it made certain clerical errors in its proposal for the work, and sought relief upon those grounds. The respondents denied that such clerical errors were made, and asked that the bill be dismissed. The issue thus joined, after a trial and hearing in the United States Circuit Court, held by Judge Alfred C. Coxe, resulted in a decree rendered in favor of the petitioner for the relief prayed for in the bill of complaint.

Rec. p. 450.

Thereupon respondents appealed from such decree to the United States Circuit Court of Appeals for the second circuit, their assignment of errors appearing at pages 454-455 of the record, and thereafter such proceedings were had in said court, that on December 7, 1898, a decision was rendered reversing the decree of the United States Circuit Court with costs, and with instructions to the court below to dismiss the bill.

Rec. p. 465.

The argument in the United States Circuit Court of Appeals was had before Judges Wallace, Shipman and Lacombe, and the decree of the lower court was unanimously reversed. Two opinions were written, one by Judge Wallace, and one by Judge Shipman.

Rec. pp. 457–467.
91 *Federal Reporter, p.* 28.

Judge Wallace in his opinion held that the only clerical mistake shown to have been made by petitioner was the result of gross negligence upon its part, and that it had prepared its proposal with a haste which was unnecessary and inexcusable. He also held that it was manifest that petitioner did not intend to give the Executive Board of the City of Rochester an opportunity to correct the mistake and award the contract on the corrected basis; and further, that the mistake was unilateral and could not be corrected by a Court of Equity.

Judge Shipman's opinion was based upon the former propositions. It was not held in either opinion that the errors were honestly made, but Judge Wallace, in his opinion, stated that the acts of the petitioner were "well calculated to excite distrust on the part of the board and induce its members to believe that the alleged mistakes were an afterthought, conceived after the complainant had been convinced by studying the proposals of its competitors that it could not profitably carry out the contract on the terms proposed."

Rec. p. 459.

The opinion of Judge Wallace shows that petitioner called the attention of respondents to only one of the alleged mistakes and that it did not ask to withdraw its bid, and took no further action on its behalf until about twenty days thereafter, when the board had already awarded contract No. 1 to the lowest bidder, and that its acts were such as to excite distrust in the minds of the members of the board.

Rec. pp. 458-59.

The facts as established by the testimony, and as found by the Court, are substantially as follows:

1. That part of the Charter of the City of Rochester which is material to the questions involved in this suit is as follows:

> "§ 6. *Officers elected and appointed.* — The officers of said city shall be one mayor, one treasurer, three members of the executive board, two judges of the municipal court, one police justice, one supervisor for each ward, one alderman for each ward, one constable for each ward, and one commissioner of common schools for each ward; all to be elected by the electors of the city, by ballot, as hereinafter provided; one city clerk, one auditor, one city attorney, one overseer of the poor, three assessors, one sealer of weights and measures, one city surveyor, two police commissioners and one police clerk, to be appointed as hereinafter provided, and such other officers as are, by this charter or other law, to be elected or appointed."
>
> *New York Laws of 1892*, Chap. 190.
>
> "§ 142. *Creation of Executive Board.*—There shall be an executive board of the said city which shall consist of three members, who shall be electors and freeholders of the said city, chosen at each biennial election by the electors of the city, each to hold his office for the term of two years, commencing on the first day of January next after his election, except as hereinafter provided. The members now in office shall be members of the executive board until the expiration of their terms of office respectively."
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> *New York Laws, 1897*, Chap. 784, § 32.

"§ 149. *Powers and duties of Board as to improvement of streets, etc.; street superintendent.* The executive board shall have sole power to let all contracts to be made by said city in pursuance of any ordinance, except such as are by law directed to be otherwise made, and shall superintend the execution of the same and shall have the superintendence and control of all work or improvements ordered by the common council. * * *"

New York Laws, 1880, Chap. 14.

"§ 150. *Powers and duties of board as to water works; water meters; actions for penalties.*—The executive board shall have control of the water works of said city, and of the construction of all extensions and additions, improvements and repairs of the same, and of furnishing the water to citizens, and the care and repair of said works, and to the end shall have the powers granted to the board of water commissioners of said city by section three of chapter seven hundred and fifty-four of the laws of eighteen hundred and seventy-three, and they may make such rules and regulations and establish such rates for the use of water as they may deem proper. * * *"

New York Laws, 1890, Chap. 561.

"§ 153. * * * They (the executive board) shall keep a record of their proceedings and of all receipts and expenditures, which shall be published in at least one daily paper in said city. * * *"

New York Laws, 1880, Chap. 14.

"§ 154. *Appointment of Clerk; compensation; duties.* The executive board shall have power to

appoint a clerk of the board, to hold during its pleasure, and to fix his compensation, and he shall keep a record of all the proceedings of the board, and perform such other duties as the board may prescribe."

New York Laws, 1880, Chap. 14.

"§ 172. * * * The executive board is hereby directed to cause a notice to be published in one or more of the daily newspapers of said city at least ten day before the letting of any contract for sealed proposals therefor, each to be accompanied by a bond signed by at least two responsible sureties, conditioned that the person, firm or corporation making such bid, if it is accepted, will perform the work or furnish the materials, or both, mentioned in such proposals, and fulfill any contract that may be made with him, them or it, and the amount specified in the bond shall be recoverable thereon in case the prosperer fails to perform the conditions of the bond and its accompanying proposal; such bids shall be opened on the day named in such notice. Said board may let any contract as it deems for the best interests of the taxpayers, but it shall publish all bids received by it, and the persons, firms, or corporations to whom contracts are awarded. Such contracts shall be enforceable by and in the name of the City of Rochester, or said executive board as such. *Neither the principal or sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made and the same shall have been duly executed.*" * * *

New York Laws, 1890, Chap. 561, § 28.

2. Pursuant to § 172 of the charter quoted above, the notice of letting provided that after a bid had been delivered to the executive board, or clerk, it could not be withdrawn.

Rec., p. 97.

3. In the month of December, 1892, the executive board of the City of Rochester determined to construct a new conduit about thirty miles in length, for the purposes of a water supply for the city, leading from Hemlock lake to the City of Rochester, and it advertised for proposals for the construction of such work in connection with its water works system.

Rec., pp. 95–106.

The work was divided into two sections. The first consisted of a masonry water conduit, tunnel and gatehouse, commencing at Hemlock lake and terminating at a point on or near the outlet of Hemlock lake, about 12,000 feet northerly, and embodied in what is known as contract No. 1.

The second section of the work began at the north end of the masonry conduit, and terminated at Mt. Hope reservoir in the City of Rochester, and involved the laying of a rivited steel pipe 38 or 40 inches in diameter, about 140,000 feet long. This work was embodied in what is known as contract No. 2. Said executive board at the same time, also advertised for proposals for the work known as contract No. 3, being the construction of a cast iron conduit 30 inches in diameter and about 140,000 feet long, beginning at the north end of the above named masonry conduit, and being an alternative to the preceeding No. 2, except the furnishing of the 36 inch iron pipe and specials. Said executive board at the same time, also advertised for proposals for the work known as con-

tract No. 4, being the furnishing of about 140,000 lineal feet of 36 inch cast iron pipe special castings, being an alternative to the rivited steel pipe mentioned in contract No. 2. Petitioner submitted no bids upon contracts Nos. 3 and 4, and the whole question here arises concerning contracts Nos. 1 and 2.

4. The proposals for bids found in the record (*p.* 106) stated that general plans for the work could be seen and specifications and forms of proposal and contract and bonds could be obtained at the office of the executive board, 20 City Hall, Rochester, N. Y., and at page 107 of the record, commences the proposal for contract No. 2, and at page 334 of the record, commences the proposal for contract No. 1.

5. The specifications of contract No. 2, provided for two routes, known respectively as "A" and "B." Route A involved several crossings of the existing and former channels of Honeoye creek. Route B was located wholly on the westerly side of Honeoye creek, and avoided the crossings by following the course of a lateral valley for some distance, and then returning to the west bank of the creek by means of a masonry conduit and tunnel about 1,000 feet long. These two routes were identical with the exception of about 8,000 feet.

Rec., pp. 95–96.

6. In December, 1892, advertisements were inserted in various newspapers directed to contractors, calling for bids or proposals for the work specified in the four contracts, bidders being required to present their proposals on December 23, 1892, at 12 o'clock noon. It was provided that all bids should be made on the printed forms of proposals furnished by the executive board, and that

the bond attached to each form of proposal should be properly executed.

Rec., pp. 95–106.

7. The petitioner, a corporation organized under the laws of the State of New Jersey, having its principal offices in the City of New York, was engaged in constructing water plants, railroads and other public works in various parts of the country. About December 10, 1892, petitioner observed in the "Engineering News" the respondents' advertisement for bids, and immediately procured a copy of the proposal blanks, and sent its civil engineer, Mr. Edwin H. Burlingame, to Rochester for the purpose of familiarizing himself with the situation, and of preparing proposals on the work.

Rec., pp 16, 17 and 26.

Bids for the work, upon the proposal blanks, were submitted by petitioner, and it claims to have made errors in bidding on the following items in Ronte B:

"*d.* For all earth excavation in open trenches or pits, for the masonry and pipe conduit, entrance and overflow-chambers, gate-vaults, blow-offs, pipe overflows, bridges, railroad crossings, creek crossings, and culverts carried under said conduit, including bracing and sheeting, backfilling of trenches and masonry, making embankments and other final disposal of the excavated material with haul of 1,000 feet or less, bailing and draining, and all incidental work, the sum of fifty cents, ($.50) per cubic yard."

Rec. p. 118.

"*h.* For all earth excavation in tunnel, including all necessary bracing, timbering, lighting, ventilating, removal and backfilling and other final disposal of the excavated material with haul of 1,000 feet or less, pump-

ing, bailing and drainage, and all incidental work, the sum of one dollar and fifty cents ($1.50) per cubic yard."

Rec. p. 119.

8. Mr. Burlingame had all the facts before him when preparing petitioner's bid. He does not claim to have been ignorant of the prices or quantities. He was not an inexperienced man, but on the contrary had had 37 years experience as a civil engineer and had been in petitioner's employ over 7 years, and had had charge of the general engineering and general work of the corporation. (*Rec. p.* 16.) In some instances he made all the specifications and plans and no man saw the work until it was finished. (*Rec. pp.* 35, 36.) He says the plans for the Rochester work were not more complicated than need be (*Rec. pp.* 40, 42), and that he fully understood them. (*Rec. p.* 41.) He was given all the assistance he asked for by respondents' engineer. (*Rec. p.* 42.) When he came to Rochester he presented to Mr. Kuichling the chief engineer of the water works department of the City of Rochester, a letter of introduction from one of Mr. Kuichling's old personal friends, in consequence of which he received special attention. (*Rec. p.* 281.) He had examined the plans as much as was necessary, and until he fully understood them. (*Rec. p.* 42.) He spent sufficient time in going over the route. (*Rec. p.* 43.) About 13 days before the letting he received his first information with reference to the work. (*Rec. p.* 19.) The letting took place Friday December 23, 1892, at 12 o'clock noon, and Mr. Burlingame reached Rochester on the morning of the preceding Monday, and his entire business at Rochester was to investigate the work in question, and prepare and submit bids for it on the part of the petitioner. On Monday he met Mr. Kuichling, respondents' engineer, with whom he examined the plans

and obtained various data relative to the work. (*Rec. pp.* 22, 23.) On Tuesday he went over the line of the proposed conduit, walking most of the way, studying the topography, and familiarizing himself with the locality. *Rec. p.* 24.) On Wednesday he conferred with various residents of Rochester as to the prices of labor and material, and with the representatives of the manufacturers of pipe. (*Rec. pp.* 24, 25.) These investigations also occupied the greater part of Thursday during which time he made various memoranda. (*Rec. pp.* 25, 26.)

9. Mr. Moffett, the president of petitioner, was expected to reach Rochester Thursday night. (*Rec. p.* 49.) But he did not arrive until after ten o'clock Friday morning, and the bids were then, after his arrival, by Mr. Burlingame, in his presence, filled out, and Mr. Burlingame in filling the blanks in item "d" which concerned route "B" (*rec. p.* 119) wrote the words "fifty cents" and also inserted the figures "$.50" when he says he intended to have written "seventy cents;" and in item "h," on the same page, which concerned the item for earth excavation in tunnel, wrote the words "one dollar and fifty cents" and inserted the figures "$1.50," when he says he intended to have written "fifteen dollars." (*Rec. pp.* 28, 29.) The only evidence of such intention is the testimony of Mr. Burlingame, and he says he made the mistake and wrote what he did not intend to write because he had become nervous over Mr. Moffett's slowness in appearing, and the magnitude of the work seemed to him to demand more time than he had in which to make the bids; that his mind was confused. (*Rec. p.* 29.)

10. Respondents content that these prices were consciously and purposely inserted, and that no mistake was made, but that the petitioner presented an unbalanced

bid, or that it was guilty of negligence. Mr. Burlingame himself says there was gross carelessness on his part, and that he was careless in allowing the bid to go before the commissioners without his careful scrutiny in going over it again to check it up; (*Rec. p.* 58) and that he did not give the matter thought and did not notice it until after the thing was over. (*Rec. p.* 53).

11. Both Mr. Moffett and Mr. Burlingame appeared before the executive board of the City of Rochester at noon on the 23d of December, 1892 and submitted the proposal bid which Mr. Burlingame had prepared. The petitioner's bid was read last. It was somewhat unusual in form, gave rise to some criticism and on that account was laid aside and read after the other bids, and after the board had determined to receive it. Both the clerk of the board, Mr. Neville (*Rec. p.* 294), and Mr. Kuichling, the chief engineer of respondents (*Rec. p.* 283) testified that petitioner's bid was read after the other bids. Mr. Burlingame testified that petitioner's bid was read first (*Rec. p.* 32) but Mr. Moffett, the president of petitioner, who was present, does not testify on that point, and the other witness for petitioner, Mr. Porter did not testify positively on the subject, but gave it as his impression that petitioner's bid was read before the others. (*Rec. p.* 85).

Mr. Burlingame testifies that when petitioner's bid was reached, he immediately called the attention of the executive board to the alleged mistake in bidding on earth excavation in open trench. He says he did not call its attention to the alleged mistake in bidding on earth excavation in tunnel (*Rec p.* 56) and it is so stated in the opinion of Judge Wallace. (*Rec. p.* 458).

12. Petitioner's proposal contained the statement on its first page, that petitioner had carefully examined the

notice of letting, the specifications and the form of contract and bonds, all of which were set out at length in the printed pamplet in which its bid was submitted; also that it had examined the general plans and locality of the work, and that it fully understood the meaning of the notice, specifications, contract and bonds, and would fully comply with all the terms therein mentioned for the prices submitted.

Rec. p. 107.

The notice of letting under which petitioner submitted its bid and which by the statements above referred to, it admits it had "carefully examined" and "fully understood," provided for an option to be exercised by the executive board of selecting either route "A" or route "B," and between cast iron and steal pipe in awarding the contract.

Rec. p. 95.

The notice also contained provisions with reference to the proposal bond.

Rec. p. 96.

The notice of letting also provided that after a bid had been delivered to the executive board, or its clerk, it could not be withdrawn.

Rec. p. 97.

13. The award of the contract as stated in the advertisement for bidders, was to be made as soon as practical, after the bids had been opened and read, and after five days notice of an award, the bidder was required to appear before the executive board with his sureties and execute the contract in accordance with his bid, and for a failure to do so he was to be regarded as having abandoned all intention of executing the contract or performing the work.

Rec. p. 97.

14. Under these terms and the other terms stated in the notice of letting, petitioner submitted its bid on contract No. 2, which appears in the record at page 89 to 276 inclusive. Its bid was in all respects like the bids of other contractors under the proposals except that it was submitted in two pamphlets, in one of which the prices were inserted, and in the other was found the proposal bond. This was done as claimed by petitioner, because the proposal bond was executed in New York by Henry D. Lyman and the American Surety Company, and was not brought to Rochester by Mr. Moffett, petitioner's president, in time to have the prices inserted. These two pamphlets were however, made one in language inserted in one of them by Mr. Moffett himself to the following effect: "see annexed schedule of prices in duplicate form of contract, which are made part of this bid as though incorporated herein."

Rec. p. 433.

15. The informality in petitioner's bid was certainly not the fault of the respondents, and it might lie, and was by them waived. The fact that the bids on both contracts Nos. 1 and 2 were enclosed in a single wrapper, is an informality like that of submitting the bids in two pamphlets, and might be, and was waived by respondents. Petitioner's bid was read and received in all respects as the bids of other contractors. (*Rec. p.* 283, 295).

16. On January 6, 1893, the executive board let contract No. 1 which is the contract for the masonry water conduit, tunnel and gate-house, to the lowest bidder. Petitioner submitted a bid upon this work, but its bid was $81,272 higher than the lowest bidder.

Rec. pp. 439-440.

17. On January 12, 1893, 20 days after the opening of its bid, petitioner presented to the executive board a written communication which appears at page 86 of the record, in which it claimed that there was an express understanding that both contracts No. 1 and 2 were to be let together, calls attention to its alleged mistakes in bidding on earth excavation, and requests that both contracts be let to it at its corrected prices, or that it be allowed to withdraw its bid. This statement was evidently presented for the purposes of this litigation, which was threatened in the communication itself. (*Rec. p.* 88). Petitioner must have known that contract No. 1 had been awarded when its statement was filed, and that consequently it was then impossible to let both contracts to it. It alleges errors in route "B," but does not offer to take the contract on route "A."

There was no understanding as claimed in the communication that contracts Nos. 1 and 2 were to be let together. Notice for bids required separate bids on four pieces of work.

Rec. pp. 95-106.

There is no intimation in the notice for proposals, or in the bids submitted that an award would be made to the lowest aggregate bidder. Each proposal is complete in itself. Petitioner bid on the masonry conduit (contract No. 1) and the steel pipe (contract No. 2) but bids were also received for a cast iron conduit (contract No. 3, upon which petitioner did not bid), and for furnishing cast iron pipe and special castings (contract No. 4, upon which petitioner did not bid.) Petitioner had no reason to suppose that the riveted steel pipe upon which it did bid would be chosen rather than the cast iron pipe upon which it did not bid, and its engineer's testimony shows that the claim that the contracts were to be let together

was without foundation, and must have been advanced to avoid the effect of its bid. Mr. Burlingame upon this subject testified as follows:

"Q. What facts were there, or what information was there, that led you to believe that these two contracts were to be let as one? A. We had the general idea that the thing was going together; that there was a certain amount of work to be done, that one man could do the whole thing, or one concern, in better shape than if there was two or three hands; and merely taking it in a general way I supposed the whole thing would go together. I had no knowledge of it specially.

Q. You had received no such information? A. No, sir.

Q. There was nothing to intimate to you from the papers that such was the case? A. No, sir.

Q. On the other hand there was a separate contract for contract No. 1, and for contract No. 2? A. Yes, sir.

Q. And you were particularly requested in the notice to contractors in each of the pamphlets to put your bids in an envelope and address them to the executive board separately? A. Yes, sir.

Q. And with all that information and with all these facts before you, you still came to the conclusion that these two contracts were to be let as one? A. I did not come to any special conclusion about it. I supposed."

Rec. pp. 56-57.

18. On January 12, 1893, the executive board adopted a resolution accepting the petitioner's proposal for the construction of the riveted steel pipe conduit on route "B" and notice was immediately given requiring said

petitioner to attend at the office of the board with sureties on or before January 19, 1893, to execute at that time, a contract for the execution of the work.

Rec. p. 10-294-295.

19. On January 18, 1893, a temporary injunction was issued in this action restraining respondents from declaring the petitioner in default. This injunction was presented at a meeting of the executive board on January 20, 1893, and thereupon the contract was awarded to Whitmore, Ranber and Vicinus for the construction of the conduit by route "A," which contract was entered into, the work commenced in March 1893, and completed in November, 1894.

Rec. pp. 60, 61, 62, 288.

POINTS.

I.

A Court of Equity has no power to relieve the petitioner from the consequences of the alleged mistakes by the remedy of cancellation or rescission, especially in view of the fact that neither mistake nor fraud has or can be charged against the respondents. The alleged mistakes of petitioner are not of such character as to warrant the interference of a Court of Equity. Counsel for petitioner concedes that no case for reformation has been made. (*Petitioner's Brief, p. 50.*)

Respondents do not wish to be understood to concede that any mistake has been made. It is their contention that the prices which it is now claimed were through mistake inserted in the proposal blanks, were placed there deliberately and

consciously for the purpose of submitting an unbalanced bid, and exactly what was written was at the time intended, or petitioner has been guilty of negligence which will prevent recission.

The record shows that this is no case of transposition of figures, or of inadvertently placing a decimal point in the wrong place. The words "fifty cents" and "one dollar and fifty cents" were written in full besides inserting the figures; and to these facts it is hardly a plausible answer to say that the person writing those words at the time intended to write "seventy cents" and "fifteen dollars," instead of the words and figures which he did write.

Rec., p. 119.

It is true he did so testify, and from the nature of things respondents could have no contradicting testimony as to the thoughts in the mind of petitioner's engineer, but if bidders for contracts in competing for public work are to be allowed by testimony of such character to avoid the consequences of their bids, there can be little object in advertising for proposals for any work. If a contractor finds when bids are opened that his bid is less than his competitors, and that the work cannot be done by him at such profit as he thinks he ought to realize, he has only to say that he did not mean what he wrote, and the pretended transposition of figures, the unbalancing of bids and the ingenuity of contractors will afford him an easy method of escape from a bid which for any reason he may wish to retract.

This case is of importance not only to these respondents, but to every municipality. The

statute required competition in letting the contract for the work. The members of the executive board are public officers governed by public statutes. In this respect their position differs from that of an individual who is not under such restraint. Under the law controlling their action, the officers having charge of this work were bound to let it for the best interests of the taxpayers—that is to the lowest responsible bidder. As public officers the executive board had no authority to allow the petitioner to cancel or withdraw its bid. The statute under which they acted provided that bidders should not have a right to withdraw bids until the board had let the contract, and in addition to this, the advertisement for bids provided that after having been delivered no bid could be withdrawn.

Rec., p. 97.

The bid of petitioner, therefore, became final when it was submitted to the executive board, and it had no right to insist upon a withdrawal or correction of it, and the executive board had no authority to allow it to do either.

It is submitted that the evidence shows that the petitioner consciously and intentionally submitted an unbalanced bid. There is some testimony offered on the part of the petitioner to the effect that the earth excavation could not be done for the amount of the bid, $ .50 per cubic yard (*Rec. p.*, 119), but the preponderance of proof is against such idea. Petitioner's engineer, who claims to have made the mistake; its president, who assisted in preparing the bid, and one of its competitors who had been doing work for it (*Rec. p.* 83), furnished the only testimony produced by petitioner

upon the subject of the sufficiency of the prices bid for earth excavation. Their testimony is more than overbalanced by the evidence submitted by respondents. Mr. Kuichling, respondents' engineer in the construction of the conduit, a man of learning and wide experience in his profession (*Rec. pp.* 279, 280); Alphonse Fteley, one of the most distinguished civil engineers in this country, who had had charge of the construction of the Sudbury river water works in Boston, who was Chief Engineer of the Aqueduct Commission of the City of New York at the time of giving his testimony, and was frequently consulted in connection with the construction of water works in other cities (*Rec. pp.* 309, 310); Edwin A. Fisher, the City Engineer of the City of Rochester; Gaylord Thompson, Chief Engineer in the construction of the West Side trunk sewer for the city, having, however, no direct connection with the municipal government; and Frederick C. Laner, a disinterested contractor, all testified that the price bid by petitioner for earth excavation in open trenches was a price at which the work could have been done without any substantial loss.

Rec. pp. 300, 303, 305, 311, 312.

Petitioner relies upon the fact that it bid $ .50 for earth excavations on route B, while its bid on route A for substantially the same work was $. 70. This establishes nothing. It appears from the proof that contractors frequently transpose their figures in bidding and that this course is taken to blind their competitors (*Rec. p.* 307). For reasons best known to petitioner, it saw fit to bid lower for earth excavations in open trenches on

one route than on the other. That is no ground for saying that a mistake was made. Otherwise, why did petitioner bid $1.50 for earth excavation in tunnel in contract No. 2, and $1.00 for substantially the same work in contract No. 1? (*Rec. pp.* 119*h* and 322*i*.) This must have been done for the same reason that it bid $ .50 for earth excavation in trenches in one route and $ .70 in the other.

If the Court will examine the proposals on contract No. 2 at page 277 of the record, it will readily see why petitioner is endeavoring to avoid its bid. The claim of mistake on earth excavation is made to cover up a low and unbalanced bid on steel pipe. In that item can be found an explanation for petitioner's attempt to cancel its bid. For example, take the item in route "B" for 38 inch single riveted steel conduit pipe, $\frac{1}{4}$ inch thick—the bid of the

Rochester Construction Company is..	$546,700 00
Petitioner's bid on this item is.....	334,950 00
	$211,750 00

The bid next above petitioner's for this same item is that of

Whitmore, Rauber & Vicinus.....	$421,190 00
Petitioner's bid.	334,950 00
	$ 86,240 00

Rec. p. 277.

The difference between petitioner's bid on this one item and those of its competitors varies from $86,950 to $211,750—far exceeding the amount of its alleged errors. To escape the consequences

of this bid it now charges the executive board of the City of Rochester with "unconscionable" conduct.

The prices on earth excavation and steel pipe do not furnish the only evidence of the unbalanced character of petitioner's bid. Other prices which are above the market price are testified to by Mr. Fteley (*Rec. pp.* 312, 313, 320). Petitioner's bid on 36 inch cast iron pipe is fifty per cent. above the market price (*Rec. p.* 312). Its bid on brick masonry laid in Portland cement, item r, route B (*Rec. p.* 121) is two and one-half times the market price (*Rec. p.* 312). This is also true of its bid on item j, route A (*Rec. p.* 313).

Petitioner's counsel seeks to avoid the effect of this testimony by showing that, taking the quantities specified into account, the difference in prices would not have made much difference in petitioner's bid. In so doing he misapprehends the purposes of an unbalanced bid. In such a bid the contractor speculates on changes in the quantities, and bids low upon quantities which he thinks will be reduced and high on quantities which he thinks will be increased. The following is an illustration of the effect of an unbalanced bid: Suppose it had been proposed to construct this conduit of brick, and that it was deemed advisable to secure bids also upon iron pipe and the specifications allowed for sufficient brick to construct the line. That the amount of iron pipe specified was small, because it was not thought that the line would be constructed of iron pipe or at least that a small quantity of iron pipe would be required. Suppose the petitioner in studying the situation reached the conclusion that a brick conduit could not be con-

structed, because such a conduit could not withstand the pressure to which it would be subjected; and it therefore bid absurdly low on brick and correspondingly high upon iron pipe. Its bids would be necessarily the lowest, and consequently accepted. Suppose it then developed that petitioner's conclusion was correct and that the line could not be constructed of brick, but that it should be constructed of iron. It would of course result in an enormous profit to the petitioner. Another illustration of an unbalanced bid can be found in

> *Reilly vs. Mayor, etc., of New York*, 111 N. Y., 473.

Little need be added to the opinion of Judge Wallace (*Rec. p.* 457) to show why the petitioner should not be allowed to succeed in this suit. As stated above the alleged mistakes are of such nature that petitioner ought not to be heard on account of them in a Court of Equity, to ask for a rescission and cancellation of its bid.

Judge Earle, speaking for the Court of Appeals of the State of New York in Dambmann vs. Schulting, (75 N. Y., at page 64) says:

> "There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases if a Court of Equity could intervene and grant relief because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he

had known the truth there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts a party must rely upon his own circumspection, examination and inquiry and if not imposed upon or defrauded he must be held to his contracts. In such cases equity will not stretch out its arm to protect those who suffer for want of vigilance."

This case is cited and approved in Cleveland vs. Smith (133 U. S., 318-329).

The general rule applicable to a case of this kind is well expressed in Chitty on Contracts as follows:

"The law judges of an agreement between two persons exclusively from those, expressions of their intention which are communicated between them; consequently an agreement cannot be affected by the mistake of either party in expressing his intention—or in his motives of which the other party has no knowledge and the party who has entered into an agreement under such mistake is bound by the agreement actually made, and cannot assert his mistake in avoidence of the agreement."

Chitty on Contracts, 11 Am. Ed. p. 1022.

"Where the mistake it unilateral and the party by whom it was made is the sufferer relief will not be granted unless there has been some undue influence, misrepresentation, surprise or abuse of confidence."

Addison on Contracts, §1182.

Judge Story says:

> "Where each party is equally innocent and there it no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference."

Story Equity Jurisprudence, § 151.

The language of the Court in the case of *Diman vs. Providence W. & B. R. R. Co.*, 5 Rhode Island, 130, is applicable to the case at bar, whether we consider the question of the alleged mistake or the negligence of petitioner. In the case referred to, the action was brought to rescind a subscription to the stock of the defendant railroad company. The complainant had subscribed $1,000 and was requested to double his subscription, or at least to renew it. He claimed that he intended to subscribe $1,000, but wrote $2,000. The court say with reference to his acts:

> "There was no mistake here at all in the sense in which a Court of Equity recognizes it in order to relieve. The complainant, at ease in the library of his own house, after having been urged by a friend to double, or at least to renew, his subscription, with his own hand deliberately subscribed his name in the book before him, setting opposite to his name in figures the number of shares (20) and the amount in money ($2,000) which he engages to take in the stock of this railroad. Grant that he designed and at the time expressed the design of renewing only his old subscrip-

tion of $1,000; yet it is not possible to account for his actual subscription otherwise than by supposing either, that at the moment he had forgotten what the amount of his old subscription was, or, that he wrote this subscription with a mind so preoccupied with something else that he did not attend to what he wrote. As a witness he does not attempt to account for it; but merely states the fact that designing one thing, he did another. Now as the complainant, so far from being weak or hallucinated, is eminent amongst us for his knowledge and employment in affairs both private and public, nothing but want of recollection or attention, which necessarily import, in such a personal act, negligence or carelessness on his part, could have permitted his hand to write what his will did not direct. * * * In cases like this where there has been no intermixture of fraud or surprise to put the applicant for relief off his guard, we must invent a new head of equity before we can interpose to save him, to the injury of others, against the effects of his own carelessness."

In *McCobb vs. Richardson*, 24 Maine Rep., 86, the following language is found:

"In the absence of fraudulent or erroneous representations or fraudulent practices on the part of the vendor it could never have been contemplated, however gross might be the mistake on the part of the vendee, that in case of loss he had any ground of complaint; and if fortunate enough to buy ever so

advantageously, however great the mistake of the vendor might have been, no one could have supposed that any portion of his gains was to be refunded."

See also *Taylor vs. Fleet*, 4 Barb., 95.

In *Wood vs. Patterson*, 4 Maryland Ch., 335, a mistake on one side was clearly shown, and yet the court refused to grant relief. The parties had been negotiating for a settlement of accounts. Complainant claimed that in making up the accounts, his clerk committed an error of $1,000 in adding the charges in the account. The accounts with this error had been forwarded by the complainant without being examined by him to the defendant who thereupon offered to compromise by paying $2,000 to which complainant consented, not knowing of the mistake, and supposing that he was abandoning only a small amount for the purposes of a compromise. Subsequently, by an accidental examination of his ledger, complainant discovered his error and sought to have the settlement opened and set aside and the balance due him paid. The court refused to relieve complainant from his mistake.

In the case of *Deeves vs. Richardson & Boynton Co.*, 39 N. Y. St. Rep., 175, decided by the general term of the New York Superior Court, the defendants made a mistake in calculating the the number of feet of pipe in submitting a proposal. Upon discovering the mistake, they endeavored to withdraw the bid, but plaintiff refused to allow them to do so. Defendants then refused to fulfill the contract according to their bid. The work was let by plaintiff to other

parties at an increased price. The action was brought to recover the additional amount which plaintiff was required to pay on account of defendants default. In their answer, defendants set up their mistake, but plaintiff was given judgment. The court said:

> "The defendants made a defense that the contract was to be set aside because of a mistake made by them in submitting their proposal. The mistake did not refer to the form or words of the proposal, but in calculating, as asserted, the number of feet of pipe. Several things might be said of this. It may be sufficient to say that the so-called mistake was the result of inexcusable negligence which the plaintiff did not induce or participate in. Such a mistake is not the ground of equitable interference."

In *Langley vs. Harmon*, 97 Mich. 353, the board of public works of Windsor, Ont., advertised for proposals for constructing a sewer and laterals. Each bid was to be accompanied by a certified check. Complainant who resided in Detroit tendered proposals and accompanied them by two certified checks upon the People's Savings Bank of Detroit. The common council accepted complainant's bid for three of the lateral sewers. Complainant refused to enter into a contract, claiming that his bid was for the entire work. The board let the contract to the next lowest bidders and claimed the right to retain the checks and apply so much of the same as necessary to make up the difference between the bids. The bill was filed to restrain the defendants from paying over any money upon the checks and for

a decree that the checks be delivered up to the complainant. Although the complainant testified that he had been told by one of the members of the board of public works that his bid might go in for the whole work, and that it would be allowed that way, the court found that he had not made out a case of misrepresentation on the part of the public authorities, or of mistake on his own part so as to warrant a rescission of his bid.

In *Riley vs. Mayor, etc.*, 111 N. Y., 473, the New York Court of Appeals refused to allow the City of New York to escape the consequences of a mistake of its engineer on public work though the mistake was clearly established and known to the other side. The engineer made a mistake in his estimate of quantities. The plaintiff contractor took advantage of it. It was charged that plaintiff, prior to making his bid, knew that the estimate misstated certain items, and in bad faith and with intent to profit by the ignorance of the surveyor made an unbalanced bid. Judge Finch dismissed the charge of bad faith on the part of the contractor, and said that he had the right to the benefit of his own knowledge, honestly acquired, so long as he did nothing to mislead or deceive the city and that there was no bad faith either in the acquisition of his knowledge or in the use of it in guiding his bid. A recovery was had by plaintiff notwithstanding the mistake was established beyond doubt.

II.

The fact that after January 20, 1893 (Record, pp. 60-61), the Respondents entered into a contract with Whitmore, Rauber & Vicinus for the construction of the conduit line which was the subject of the petitioner's proposal, and that such construction has been completed in no way affects the question presented to this court.

Petitioner was by resolution of the executive board awarded the contract for the construction of the steel pipe conduit by route "B," and was given notice to attend at the office of the board on or before Thursday, January 19, 1893, to execute the contract, and was given notice that the failure of said attendance and execution would be regarded as an abandonment of an intention on the part of the petitioner to perform the work. A copy of the resolution of the executive board, which is found at page 10 of the record, was served upon the petitioner by giving a copy to its president, Mr. Moffett, in New York, on the 14th day of January, 1893.

Rec., pp. 8, 295–296.

The respondents did nothing to prevent petitioner from entering into the contract which had been awarded to it. Petitioner, by its proposal, agreed to fully comply with all the terms set forth in the notice of letting and in the specifications.

Rec., p. 107.

The notice of letting provided that the award of the contract would be made as soon as practicable after bids had been opened and read, and

that within five days after service of a written notice to the successful bidder that said award had been made, such bidder would be required to attend at the office of the board for the execution of the contract, "and in case of failure or neglect to do so, he or they will be considered as having abandoned all intention of executing such contract or performing such work."

Rec., p. 195.

The petitioner then was given the exact notice referred to in the notice of letting, by which it had become bound in signing its bids, and can find no fault with the respondents because, after the expiration of its time to sign the contract and after its refusal so to do, respondents procured the work to be done elsewhere. Of course it could not be expected that the City of Rochester could remain without the water supply, which it needed, during a period of seven years, while petitioner has been presenting its case to the courts, and the cases cited by petitioner's counsel under his second point, have no application to this case.

III.

Petitioner was guilty of such negligence as to debar it from relief, under the circumstances as disclosed by the record.

Respondents insist that even though it be conceded for the purpose of the argument that petitioner intended to bid 70c. and $15, instead of 50c. and $1.50 on route "B" for earth excavation in open trench and tunnel, respectively, still the acts of its engineer and president in preparing and submitting its bids were acts of negligence. They

are so characterized by Mr. Burlingame, petitioner's engineer. Petitioner claims that the alleged mistakes were purely clerical in their character. So far as the bid on earth excavation in tunnel is concerned, the proofs clearly show there was no mistake. The amount of such work specified in contract No. 1 was 1,500 cubic yards, and under contract No. 2, 2,000 cubic yards. The work was substantially the same. The petitioner bid $1.00 per cubic yard for this work in contract No. 1, (*Rec. p.* 332 *i*) and $1.50 in contract No. 2 (*Rec. p.* 119 *h*). The defendant now claims that it should have bid $10 and $15 respectively. No claim of transposition of the decimal point is made for the amounts were written in words, not by a clerk, but by petitioner's engineer and in the presence of its president. In bidding, petitioner's engineer claims to have omitted to take certain items into account. His explanation of the alleged mistake for these items is found on page 53 of the record, where he says:

"In figuring up the matter of appliances that were necessary, taking care of the water and everything in the tunnel, I had made that by itself. I came then to consider the handling of the material and I put $1.50 as ample for digging it out, the men digging it out. I went on and filled this up without paying any attention to the general calculation for the appliances necessary to drive that tunnel. As I read it over, $1.50 seemed a large amount to me, an amount enough for removing so much earth. I did not give the matter thought, and did not notice it until after the thing was over."

The failure to take the elements referred to in

account was not a case of mistake, but was a case of negligence. Petitioner has failed to show with reference to this item, that its alleged mistake was clerical in its character, or that it was a mistake.

With reference to alleged mistake in bidding on earth excavation in open trench, respondents insist that it was not a clerical mistake, but like the bid on tunnel excavation, another case of negligence. Excavations are usually divided into three classes—earth, hardpan and rock. The specifications for the work in question divided the excavation into two kinds, earth and rock. The former embraced soft earth and hardpan. Mr. Burlingame says that 50c. was a fair price for removing ordinary earth. (*Rec., p.* 51.) But that some additions should be made for the removal of hardpan; that to cover hardpan he intended to bid 20c. making the bid for earth excavation in open trench 70c. He says at page 51 of the record in explanation of his bid on this item:

"I had figured that that was a fair price for doing ordinary earth and gravel excavation. That was what I had figured it. That estimate of $.50 was made without consideration of the extra work to be encountered in this bid; material which I spoke of before."

Assuming his statement to be true that he intended to add 20c. to the bid to cover hardpan, his failure was not a case of mistake, but one of negligence. The fact that petitioner bid 50c. for this work on one route, and 70c. on the other is unimportant for the reason that transposition of

figures is quite common in bidding. Petitioner claims to have made a mistake in bidding on earth excavation in tunnel on contract No. 2, from which it asks this court to relieve it, and yet it bid less for the same work on contract No. 1, and was not the lowest bidder. It is submitted that petitioner's acts do not constitute mistakes as that term is understood in law. Calling acts mistakes does not alter the fact that it was a case of negligence. Legal mistake is founded in ignorance. Mr. Burlingame knew all the items necessary to formulate his bid on earth excavation, but neglected to take that into account in making the bid. His alleged mistake consisted in not committing to paper the knowledge which he possessed. Such omission is not a mistake; it is negligence.

In Pomeroy on Equity Jurisprudence, §839, in distinguishing between an act of negligence and an act constituting legal mistake, it is said, that the essential prerequisite of mistake is ignorance, and that it is also distinguished from that inattention, or absence of thought which are inherent in negligence. That the erroneous conception or conviction of the understanding which constitutes the equitable notion of mistake, has nothing in common with negligence.

This construction put upon petitioner's act in submitting its bid, as one of negligence, as also placed upon it by its engineer. At page 58 of the record, he says: "There was gross carlessness on my part; confusion, or call it what you please." And upon the next page, in explaining what he meant by the use of the expression of "gross carelessness," he said: "I say that I was careless in

allowing the bid to go before the commissioners without my careful scrutiny and going over it again to check it up."

In *Grimes vs. Sanders*, 93 U. S., 55-63, Mr. Justice Swayne, speaking for the court says:

> "Mistake to be available in equity must not have arisen from negligence where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may fairly be expected of a reasonable person."
>
> "Where the parties dealing with property stand upon a footing of equality, they must take the consequences of a contract deliberately entered into."

See also,

Pomeroy, Equity Jurisprudence, § 839.
Beach, Modern Eq. Juris., § 54.
Capehart vs. Mhoon, 5 Jones Eq., N. C., 178.
Kearney vs. Saseer, 57 Md. Rep., 276.
Glenn & Price vs. Statler, 42 Iowa Rep. 107.
Toops vs. Snyder, 70 Ind. Rep. 560.
Conner vs. Welsh, 51 Misc. Rep. (N. Y.) 431.
Moran vs. McLarty, 75 N. Y. 28.
Brown vs. Fagan, 71 Mo. Rep. 563.

The negligence of petitioner's president and engineer will not excuse the petitioner. They were acting for it and not for respondents. In this respect the case is to be distinguished from cases where a scrivener failed to reduce to writing an agreement actually made; such as the cases of *Drury vs. Hayen*, 111 U. S., 223, *Wheeler vs.*

Kirtland, 23 N. J. Eq., 13, *Menomonee Locomotive Mfg. Co. vs. Langworthy*, 18 Wisc., 444.

But it is claimed by petitioner's counsel that because of the negligence or mistake, because of the intention of the petitioner's engineer to write one amount, in place and stead of which he wrote another, and because when the bids were opened, attention was called to one of these alleged mistakes, the minds of the parties have never met, and there has never been any contract or agreement to enter into a contract. The answer to this position is found in the fact that the statute of New York, provided that after the submission of a bid, neither the principal or sureties on any bid, should have the right to withdraw or cancel the same until the executive board should have let the contract for which the bid was made, and until such contract shall have been executed.

New York Laws, 1890, Chap. 561, § 28.

By reason of this statute a bid when once submitted becomes final, and can not be changed or withdrawn until the contract has been let. The right which individuals have to withdraw offers to enter into a contract, until the offer has been accepted, does not exist in this case, by reason of the terms of the statute. The intention of the petitioner must be found in language used, and the agreement contained in its bid cannot be affected by any intention on its part to make another or different bid.

IV.

The equities are with the respondents.

Petitioner calls respondents' conduct unconscionable. The facts shown by the record warrant

no such characterization. Petitioner admits that no fraud, no concealment or unfair conduct has been or can be charged against respondents. It complains only because respondents have asked petitioner to live up to its written proposal. Petitioner's counsel says in his brief, "We are willing to concede that no case for a reformation of the contract has not been made out."

Petitioner's Brief, p. 50.

No such admission would have been made if anything like fraud on the part of respondents existed. Petitioner's expert engineer of thirty seven years' experience, and one of its trusted employes, came to Rochester with a letter of introduction from a personal friend of the Rochester water works engineer, and received on that account from him, special attention. He had all the knowledge and opportunity to acquire information he wished, and the record does not show that since the submission of petitioner's bid, he or any officer of petitioner has ascertained a single fact concerning the work or prices of materials, which would in any way affect the case. With full knowledge of the facts, with written memoranda concerning details before him, in the presence of petitioner's President, he filled out the proposal blanks, and now says the error he made was the result of negligence, and that he did not intend to write the words and figures which he wrote.

On the other hand, the respondents are in no way to be blamed for his alleged errors. They in no way contributed to them. A great public work was contemplated, and the public officers of

of the City of Rochester were bound to do as they did in preparing for it. Competitive bidding was provided for in the statute, and the forms necessary to secure it were, by the proper officers of Rochester, carefully carried out. The statute and the notice of letting both provided that bids when submitted, could not be withdrawn until the contract had been let. The reason for this provision is at once apparent. If bidders could withdraw their bids at any time before they were accepted, the opportunity to secure the lowest bidder and to procure the most reasonable cost of public work would be materially reduced. It is for the very purpose of holding the mind of the bidder to his proposal and to allow time for tabulation and comparison of bids, within which the minds of the contracting parties may meet, that this provision is made. It therefore seems to respondents' counsel idle to say that the minds of these parties had not met at the time of the acceptance of the bid. For the very purpose of making such meeting possible the statute was framed.

The alleged mistakes are of such character that if allowed in this case as a basis for a rescission, will allow astute and experienced contractors in bidding for public work, to escape the consequences of every undesirable bid, and leave public work always to be done practically without competition, or at least, without the benefit of fair competitive bidding. Acting as public officers, it was the duty of the Executive Board of the City of Rochester to insist that the petitioner should carry out its bid or forfeit its bond. The principle upon which the idea of

competitive bidding is based requires that the highest bidder should not be made the lowest by the withdrawal of the lower bids. The Executive Board of Rochester did not know what prices would be submitted by petitioner. The proposals were sealed. None but the competitors themselves knew what prices were submitted until the bids were opened. The Executive Board could not infer from the bids themselves that any mistake had been made, because of the well known fact that contractors frequently transpose figures, bidding high on some items and low on others, and presenting unbalanced bids. In this particular this case is easily distinguishable from Webster v. Cecil, 30 Beav., 62; Gerrard v. Frankel, 30 Beav., 445, and other like cases; where there had been prior negotiations and the parties knew from them that a mistake must have been made.

Whatever mistakes petitioner may have made in bidding on particular items, it should not be allowed to succeed in this suit, because, as shown in another point, the work could have been done as a whole without loss. Upon this subject petitioner has introduced no evidence. It matters little whether mistakes were made in particular items so long as the bid as a whole was profitable. Petitioner's bid was examined by Mr. Fteley after the bids where opened, and he says that at that time he reached the conclusion that the work could be done for the amount of petitioner's bid without loss, and he was of the same opinion at the time of giving his testimony.

Rec. p. 312.

While petitioner might have done the work without loss, the City of Rochester has lost something over $200,000, which represents the difference between the amount of petitioner's bid and the amount of the next lowest bidder.

For route B, the bid next to petitioner's found in the record at page 277, opposite the item "grand total with 38 inch pipe," is	$1,215,382.00
Petitioner's bid is	857,552.50
Showing a loss to the City of Rochester if this bid had been accepted, of	$ 357.829.50
The grand total with 40 inch pipe found upon the same page, for the next lowest bid is,	$1,170,886.00
Petitioner's bid is	883,472.50
Showing a loss to the City of Rochester if this bid had been accepted, of	$ 287,413.50
On route A, the grand total with 30 inch pipe for the bidder next above the petitioner is,	$1,123,920.00
Petitioner's bid is	903,324.00
Showing a loss to the City of Rochester if this bid had been accepted of	$ 220,596.00

On route A, the grand total with 40 inch pipe for the bid next above the petitioner is...	$1,225,352.00
The petitioner's bid is	939,494.00
Showing a loss to the City of Rochester if this bid had been accepted of	$ 285,858.00

So that if petitioner had carried out the terms of its contract, the City of Rochester, no matter which route had been taken, or what kind of pipe had been chosen, would have saved more than $200,000.

Rec. p. 277.

Considering the fact that petitioner might have done the work for the amount of its bid without loss, and considering the other facts in this case, petitioner must be charged with bad faith in presenting its statement to the executive board in calling attention to the alleged mistakes in bidding. Its only purpose seems to have been to prepare for future litigation. (*Rec., p.* 86.) The statement threatens the executive board with this litigation. The reason for petitioner's action, it seems to respondents, can be found in petitioner's bid on steel pipe, which was so much lower than the bid of other competitors. For the purpose of escaping the effect of this bid, the alleged mistakes and errors were found and are relied upon to give petitioner a way of escape. At the time petitioner presented its statement calling attention

to its alleged mistakes, it must have known that the executive board could not comply with its request and let both contracts to it, because one of the contracts had already been let to a bidder lower than petitioner. Petitioner alleged mistakes in route B, in contract No. 2, but it did not ask to have the contract let to it by route A. It seems it did not desire to have the executive board comply with its request, but it was endeavoring to escape its unfortunate bid on steel pipe instead of its alleged mistake in bidding on earth excavation. Petitioner claimed to have made errors in bidding $1.50 on earth excavation in tunnel, but made no mention in this statement of its bid of $1.00 for the same work in contract No. 1, upon which it was not the lowest bidder notwithstanding its low bid on that item.

Respondents cannot be restored to their position as it existed when the bid was presented, and therefore there should be no rescission. A water supply for the City of Rochester was necessary. Respondents could not be expected to await the results of this litigation before making the improvement. In *Grymes v. Sanders*, 93 U. S. 62, Mr. Justice Swayne says:

> "A court of equity is always reluctant to rescind unless the parties can be put back in *statu quo*. If this cannot be done, it will give such relief only as the clearest and strongest equity imperatively demands."

It is submitted that the reasons found for the judgment rendered by the Circuit Court of Appeals in this case, disclosed by the opinions of

Judges Wallace and Shipman (found in the record at pp. 457–465 and 467, 468) are unanswerable. The judgment of the Circuit Court of Appeals is right, and it should be affirmed.

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